

20-8377

No. _____

Supreme Court, U.S.

FILED

MAY 06 2021

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

HERBERT GARFIELD GARDNER — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Herbert Garfield Gardner TDCJ#1948640

(Your Name)

3872 FM 350 SOUTH

(Address)

Livingston, TX 77351-0000

(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

Compelling reasons exist for the exercise of the court's discretionary jurisdiction. The Fifth Circuit's [COA - DENIAL] "conflicts" with prior Supreme Court and federal law precedent. The national importance of having the Supreme Court decide and consider these important questions when state habeas applicants are being time-barred for procedural non-compliance error defects, and have not been accorded the fair notice or opportunity to respond because of misleading order instructions issued by court officials who deliberately fail to send "notice of defect" with warning that failure to comply could result in dismissal.

1. Whether state trial court's "external interference" constitutes rare and extraordinary circumstance sufficient to excuse statute of limitations time-bar, when they failed to accord fair notice and opportunity to respond, correct and resubmit?
2. Whether the Fifth Circuit abused its discretion in denying COA without ordering the development of the factual record to examine petitioner's allegation that state imposed impediment was the legal cause of time-bar?
3. Whether the Fifth Circuit's decision to deny COA conflicts with prior Supreme Court decisions "rejecting" Fifth Circuit's [COA - TEST]?

The Supreme Court should examine the "LEGAL CAUSE" behind the state trial court's ministerial action "induced" by court officials to avoid any possibility of an acquittal on appeal, and to derail habeas relief with timeliness obstacle resulting in time-bar. For these reasons, pro se petitioner's failure to raise his habeas claims earlier solely on the basis of state imposed impediment is cause outside of his control. McClesky v. Zant, 499 U.S. 467, 495 (1991)

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Herbert Garfield Gardner (Federal Prisoner:#1948640)
Petitioner - appellant

Herbert Garfield Gardner
[NTC Pro Se]
CID Polunsky Prison
3872 FM 350,S.
Livingston, TX 77351-0000

v.

Bobby Lumpkin, Director, Texas Department of Criminal
Justice, Correctional Institutions Division
Respondent - Appellee

Jessica Michelle Manojlovich
[COR LD NTC Government]
Office of the Attorney General
P.O. BOX 12548
Capitol Station
Austin, TX 78711-2548

RELATED CASES

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
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McClesky v. Zant, 499 U.S. 467, 495 (1991)	1, 5C
McQuiggen v. Perkins, 569 U.S. at 383	5C
Murray v. Carrier, 477 U.S. at 496	3, 5C
Prieto v. Quarterman, 456 F.3d 511, 514 (5th Cir. 2006)	5B
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28 U.S.C. § 1254(1)	5C
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[] reported at UDC, 1972, at 11; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[] reported at UDC, 1972, at 11; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the STATE court appears at Appendix E to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 30, 2021.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 7, 2020, and a copy of the order denying rehearing appears at Appendix B.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

The Supreme Court determined in *Hohn v. United States*, 524 U.S. at 236; that a denial of a [COA] could be brought to the Supreme Court through a petition for a writ of certiorari, to review denials by a circuit judge or a panel of a court of appeals under 28 U.S.C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was November 14, 2018. A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: January 13, 2016, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Compelling reasons exist for the excercise of the court's discretionary jurisdiction. Pro se petitioner has been denied due process and has been deprived of basic fundamental rights and seeks relief to restore those constitutional rights.

The U.S. Court of Appeals for the Fifth Circuit's denial of COA directly conflicts with prior Supreme Court and federal law precedent significant to render doubt and prejudice because they failed to consider legal "cause" for statute of limitation time-bar was not the result of procedural non-compliance, but the direct result of a state imposed impediment which prevented timeliness was debatable. Slack

The Supreme Court has "REJECTED" the Fifth Circuit's test for COA. Gardner has clearly demonstrated through his motion for issuance of COA, that summary dismissal was improper because the "soundness" of the lower court's assessment and procedural ruling was debatable when Gardner had asserted habeas claims that had not been fully developed due to that procedural ruling. Slack v. McDaniel, 529 U.S. at 484

The Supreme Court determined in Hohn v. United States, 524 U.S. 236; that a denial of COA could be brought to the Supreme Court Through petition for a writ of certiorari under § 1254(1), to review denials by a circuit judge or a panel of a court of appeals. "Lack of Notice" qualifies for equitable tolling. Davis v. Johnson 158 F.3d 806, 811 (5th Cir. 1998).

A court must not dismiss habeas application without first according applicant fair notice and a fair opportunity to respond before acting on its own initiative because one year statute of limitations is tolled for failure to send "notice of defect." Equitable tolling applied during period between lower court's decision and filing habeas in higher court. Grillette v. Warden, 372 F.3d 765,770 (5th Cir. 2004)

Federal habeas review not precluded because state trial court failed to adjudicate the merits. They did not address a single factual allegation raised in habeas application. If facts are still not developed despite diligence, petitioner is not deemed to have "failed to develop" the facts that were adequately presented in state court, but through no fault of his own. "External interference" prevented review.

In Murray v. Carrier, 477 U.S. at 496 the court stated time bar would be excused, even in the absence of "cause" when constitutional violation has probably resulted in the wrongful conviction on one who is actually innocent. Gardner has been denied due process under the fifth, sixth, and fourteenth amendments of the U.S. Constitution and has been deprived of his life, liberty, and effective assistance of counsel at trial and on direct appeal. The writ must issue.

STATEMENT OF THE CASE

On August 15, 2014 Herbert Garfield Gardner entered a not guilty plea to the charge of capital murder. Jury verdict found him guilty and sentenced him to life without parole in cause no. 1372136. On that same day he gave notice of appeal.

On direct appeal, appellate attorney argued that the evidence was "insufficient" to support the jury's verdict that appellant committed the offense of capital murder as there was insufficient proof of the predicate crime of burglary. The Fourteenth Court of Appeals at Houston, affirmed the conviction. No.14-14-00690CR

On January 13, 2016 PDR was refused.[Doc.#9-15, at 1]. Gardner's conviction became final when his time to seek certiorari review expired on April 12, 2016. That date triggered the statute of limitations for federal habeas corpus review which expired one year later on April 12, 2017.

On December 18, 2016 , Clearly within AEDPA statute of limitation 1-year, Mr. Gardner submitted formal filing of his writ of habeas application in state court to challenge his conviction under Article 11.07 [Doc.#10-7, at 6-39].

On January 5, 2017 - Just three weeks later. State trial court officials issued: State Proposed Order to Designate Issues. see APPENDIX D on page 11A,B.

On January 25, 2018 Gardner submitted an "amended" habeas to "pending" application asserting one additional claim that accused Harris County District Attorney's Office of corrupt charging practices.[Doc.#10-8, at 52-67].

On July 23, 2018 Gardner filed writ of mandamus to compell a ruling after unexplained and unreasonable delay of twenty-three months.[Doc.#10-7, at 1; Doc.#10-9, at 54].

On November 14, 2018 The Texas Court Of Criminal Appeals, after having received habeas application without any recommendation, dismissed writ of habeas application for failure to comply with procedural rule 73.1 page-limits.[Doc.#10-3, at 1].

On December 18, 2018 Gardner filed his second "amended" habeas application w/ certificate of compliance. No response. Filed second writ of mandamus to compel ruling.[Doc.#10-16, at 1-2;Doc.#10-17, at 1-2].

On May 22, 2019 The Texas Court of Criminal Appeals summarily denied without written order.[Doc.#10-18, at 1].

On June 3, 2019 Gardner filed a writ of habeas in federal court.[Doc.#1-1,at 1-23].

Gardner's federal habeas corpus application raised the issue of timeliness was outside of his control when state trial court official deliberated held his initial habeas application in abeyance for twenty-three months w/o any legal explanation whatsoever was improper and constituted rare and extraordinary circumstance because court officials prevented timely filing because they never sent a "notice of defect." Gardner raised the follwing grounds for habeas relief:

1. He is actually innocent of the offense of offense because the prosecution "induced" perjury and withheld exculpatory evidence documents regarding a third-party perpetrator, and did not meet it's burden to prove that a burglary occurred beyond a reasonable doubt when ADT ALARM REPORT WITHHELD.
2. Appellate counsel was ineffective for failing to raise an issue about whether he was entitled to a jury instruction on the defense of "sudden passion," was unreasonable.
3. Appellate counsel was ineffective for failing to raise an issue about the trial court allowing the prosecutor to refer to evidence not in the record over his trial attorney's objection was unreasonable.
4. Appellate counsel was ineffective for failing to raise an issue about the prosecutor knowingly used perjured testimony to contrive a conviction was unreasonable.

On March 27, 2020 The U.S. District Court granted respondent's motion for summary judgment and dismissed federal habeas application as time-barred by the governing one year statute of limitation [Doc.#8].

Gardner filed a response - motion to alter or amend judgment pursuant to rule 59(e) [Doc.#15], On April 9, 2020. The U.S. District court ordered motion denied and no COA will issue.[Doc.#22];

Gardner filed notice of appeal [Doc.#25]; in forma pauperis granted, May 11, 2020; Motion for issuance of COA [DENIED];[Doc.#32].

On June 12, 2020 Gardner filed motion for issuance of COA in the U.S. Court of Appeals for the Fifth Circuit [9336123-2]. Motion due satisfied. [20-20238]. Brief in support of COA deadline satisfied. [9336125-1]. Exhibits in support of COA ENTERED on June 17, 2020.

On March 30, 2021 The Fifth Circuit's response: [COA - DENIED].

STATEMENT OF THE CASE

REASONS FOR GRANTING THE PETITION

Compelling reasons exist for the exercise of the court's discretionary jurisdiction. The U.S. Court of Appeals for the Fifth Circuit's denial of Gardner's COA "conflicts" with prior Supreme Court and federal law precedent. The Fifth Circuit erred in its objectively unreasonable determination "LEGAL CAUSE" for TIME-BAR. Gardner asserted timeliness issue in his motion for issuance of COA, "showing cause," [STATE IMPOSED IMPEDIMENT], on the basis of state trial court official's unexplained and unreasonable delay "impeded" and prevented timely filing that resulted in statute of limitations time-bar when court official deliberately failed to warn and failed to send "notice of defect," SEE: issue#2 - Brief in support COA.

In good faith, Gardner was grossly misled to believe that habeas application was "pending" collateral review, when just three weeks after formal filing date December 18, 2016. State trial court issued: "The State's Proposed order designating unresolved issues of ineffective assistance of counsel." Misleading order instructions were "frivolous," No response - no review ever happened, this order dated: January 5, 2017; see [APPENDIX - D]; There was no adjudication on the merits.

Gardner demonstrates how state trial court official's ministerial action was nothing more than a "strategic delay tactic" "induced" to goad habeas applicant into procedural default making compliance with procedural rules impracticable while not only preventing timeliness, but also preventing any possibility of an acquittal on appeal. Failure to adjudicate on the merits of plausible habeas claims denied due process constitutional right to "one full round" of habeas review.

The record reflects a substantial delay of (23) months in which court official [HELD] habeas application in "ABEYANCE" and failed to respond to appeal update inquiries without any legal explanation whatsoever was [IMPROPER], and unacceptable because court officials knew that failure to comply with procedural rules could result in dismissal and ultimately -"statute of limitations 1-year time-bar. [Doc. #18]. Frady, 456 U.S. at 167; "showing cause."

Gardner asserts that he did not become aware of any procedural non-compliance to rule 73.1 error issue until after the Texas Court of Criminal Appeals dismissed writ of habeas application concluding that submission failed to comply with procedural rule 73.1 page-limits, had resulted in time-bar. [Doc.#10-3, at 1].

Habeas review not precluded because state court declined to follow its own procedural rule. "Lack of Notice" qualifies for equitable tolling when failed to accord Gardner fair notice and fair opportunity to respond constitutes "rare and extraordinary circumstance that made compliance with procedural rule 73.1, imprac-

ticable. Habeas review not precluded because Gardner's "legal cause" for state imposed impediment claim relies on a factual predicate that could not have been previously discovered. The Supreme Court has held that generally an omission of a claim from an earlier petition may be excused when objective "cause" shown for failing to raise the claim earlier and actual prejudice resulted from inability to raise when state trial court "impeded" with unexplained delay of twenty-three months is the greater problem when unexplained decisions clearly adopted same reasoning: "Gardner's initial habeas corpus application submission failed to comply with procedural rule 73.1, page-limits was improper. Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998)

Gardner demonstrates and stresses his point. The Fifth Circuit erred when it denied COA, and the U.S. District Court's summary dismissal was improper because federal courts are required to "look through" the unexplained decisions to the last state-court decision that provided relevant rationale. However, that did not happen, both courts merely adopted same reasoning that was ultimately based on an erroneous procedural ruling made by state court officials. Wilson v. Warden, 834 F.3d 1227 U.S. App.Lexis (2016)

The Texas Rules of Appellate Procedure [RULE 73.2 Noncompliance], clearly states: The clerk of the convicting court will not file an application that is not on the form prescribed by the Court of Criminal Appeals, and will return the application that ["DOES NOT COMPLY WITH THIS RULE"], return the application to the person who filed it, with a copy of the official form. The clerk of the court may, without filing an application that does not comply with this rule, return it to the clerk of the convicting court, with a notation of the defect, and the clerk of the convicting court will return the application to the person who filed it, with a copy of the official form. The "root cause" here is no "notice of defect sent."

Gardner's motion for issuance of COA, requested certification on all claims raised pursuant to 28 U.S.C. § 2254(d). Gardner's assertions "irrefutably made a sufficient showing" to satisfy requirement 28 U.S.C § 2253(C)(3), when actually, state court officials failed to comply with procedural rule 73.2, failed to send "notice of defect" and failed to accord fair notice and opportunity to respond was reversible error. Grinchley v. Thaler, 586 F.3d 318, 320-21 (5th Cir. 2009)

The Supreme Court "rejected" the Fifth Circuit's [COA-TEST], and has clarified that a COA should issue when important facts deserve encouragement to proceed further. If facts are still not developed, despite diligence, then Petitioner has not "failed to develop facts." Prieto v. Quarterman, 456 F.3d 511,514 (5th Cir. 2006)

Gardner diligently sought to develop habeas claims in state court proceedings but through no fault of his own, was prevented from doing so, when in "good faith" he relied on misleading state proposed order instructions. see: [APPENDIX D] on page 11. Hall v. Quarterman, 534 F.3d 365-67 (5th Cir. 2008)

Habeas review not precluded. Gardner asserts, there has been no adjudication on the merits. The facts are still not developed, which if allegations are true, merit relief. For this reason, Gardner desperately seeks the court's consideration that adequate relief cannot be obtained in any other form or from any other court.

Gardner's writ of habeas petition asserts new substantial evidence in support of his innocence. Gardner has made a prima facie case of "actual innocence," in light of new evidence wrongfully withheld. But for constitutional errors, it is more likely than not that no reasonable fact finder would have convicted him beyond a reasonable doubt. Schlup v. Delo, 513 U.S. 298,327 (1995)

In Murray v. Carrier, The Supreme Court held that procedural default would be excused, even in the absence of "cause" when a constitutional violation has probably resulted in the conviction of one who is "actually innocent." 477 U.S. at 496; also see: House v. Bell, 547 U.S. 518, 536-37 (2006)

Gardner seeks issuance by the court of an extraordinary writ authorized by 28 U.S.C. § 1651(a), because exceptional circumstances warrant the exercise of the court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. McClesky v. Zant, 499 U.S. 467,495(1991)

Under AEDPA, State court determinations on ineffective assistance claims are reviewed under standards set forth in § 2254(d), reviewed under deferential - "objectively unreasonable" standard. Where government conduct intended to "goad" defendant into procedural default and being time-barred, the double jeopardy clause may bar further prosecution. Oregon v. Kennedy, 456 U.S. 667,676 (1982)

NATIONAL IMPORTANCE

Gardner stresses that this is a matter of national importance when any person has been denied due process having been deprived of their constitutional right to "One full round" of habeas review. The Supreme Court should examine and prevent "external interference," to afford future habeas applicants, the full panoply of the protections afforded by the United States Constitution, to have habeas claims heard on the merits, allowing fair opportunity to obtain habeas relief.

The writ must issue because failure to review Gardner's habeas claims has resulted in a fundamental miscarriage of justice. McQuiggen v. Perkins, 569 U.S. 383

Applying AEDPA one-year statute of limitation. Gardner seeks review under 28 U.S.C. § 2244(d)(1):

- (B) The date on which the impediment to filing an application created by state action in violation of the constitution or laws of the United States is removed, if the appellant was prevented from filing by such state action;
- (C) The date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

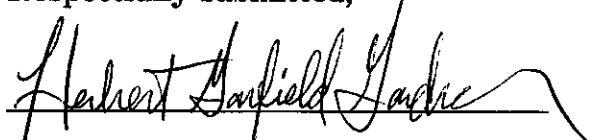
For these reasons, Gardner's petition is not barred and habeas review is not precluded, COA denial - improper. The solution is simple. Counsel should be appointed. Consider, to have appellate assistance "extend" throughout habeas review. "No state shall deprive any person of life, liberty, or property without due process of law." 28 U.S.C. § 1651(a). "Legal cause" for time bar-state impediment.

CONCLUSION

Pro se petitioner has been denied due process and has been deprived of basic fundamental rights guaranteed by the fifth, sixth, and fourteenth amendments of the U.S. Constitution and seeks relief to restore those rights.

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Date: April 31, 2021